In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

APPELLANTS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

APPELLEES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case[1] [Appendix A].

[1] The judgment affirmed dismissal of two of three counts of a treble-damage complaint under Section 4 of the Clayton Act (15 U.S.C. 15). Dismissal of the third count, a claim for damages as a result of alleged violations of the Robinson-Patman amendments to the Clayton Act (15 U.S.C. 13), was reversed and remanded to the trial court [Appendix A]. This petition is limited to a request to review the ruling of the Court below with respect to the first two

[Footnote continued]

CITATIONS TO OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division, which entered summary judgment against petitioners, are reported at paragraphs 71,801 and 71,802 in CCH 1966 Trade Cases and appear in the Appellants' Appendix at 7 et seq. and 14 et seq.

The opinion of the United States Court of Appeals for the Seventh Circuit which affirmed in part and reversed in part the judgment of the District Court is reported at __ F.2d __ and appears herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 25, 1967. A petition for rehearing en banc was denied on June 7, 1967 [Appendix C]. On August 30, 1967 the Court entered an order extending time to file Petition for a Writ of Certiorari to and including October 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Without trial, may a Federal Court immunize a major national franchisor from treble-damage liability to its franchisees under Section 4 of the Clayton Act (15 U.S.C. 15) on the sole ground that the franchisees are *in pari delicto* with the franchisor as a result of having executed the franchisor's standard form franchise agreement which the franchisor offered them as the only basis on which it would do business, where the franchisor, through coercive threats of franchise termination, compelled its franchisees to comply with provisions in its franchise agreement which required franchisees to,

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[Footnote 1 continued]
counts: claims alleging violations of Section 1 of the Sherman Act, 15 U.S.C. 1 [Count I], and Section 3 of the Clayton Act, 15 U.S.C. 14 [Count II].

(a) deal exclusively with the franchisor as a supplier of all goods offered for sale by the franchisees; and

(b) purchase non-trademarked "tied products" from the franchisor as a condition of purchasing the franchisor's trademarked and nationally advertised "tying product"; and

(c) sell all products at prices fixed by the franchisor?

2. Does an ousted franchisee have a cause of action against his franchisor under Section 4 of the Clayton Act for damages resulting from termination of his franchise agreement by the franchisor because of the ousted franchisee's refusal to comply with the exclusive dealing provisions in the franchisor's standard form franchise agreement?

3. Does the franchise method of distribution of a major national franchisor which (1) enforces requirements in its standard form agreements that (a) franchisees deal exclusively with the franchisor, and (b) purchase tied products from the franchisor; which (2) restricts the franchisees' right to establish the price at which they sell merchandise which they have purchased; and which (3) limits the persons to whom franchisees can sell merchandise which they have purchased, constitute a violation of Section 1 of the Sherman Act and/or Section 3 of the Clayton Act?

4. Is proof of a conspiracy essential to state a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1, or is proof of an agreement in restraint of trade by itself, without proof of a conspiracy, sufficient to state a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1?

STATUTES INVOLVED

The Statutes involved are Section 1 of the Sherman Act, 15 U.S.C. 1; Section 3 of the Clayton Act, 15 U.S.C. 14; and Section 4 of the Clayton Act, 15 U.S.C. 15. These are printed herein as Appendix D.

STATEMENT OF CASE

Plaintiffs entered into standard-form preprinted franchise agreements with the defendant Midas (in 1955-56) to obtain the right to purchase and sell defendants' MIDAS muffler. These franchise agreements, which were drafted by the defendants, were offered to plaintiffs and other franchisees as the only basis on which defendants would sell their MIDAS muffler. The agreements encompassed an aggregation of trade restraints which severely circumscribed the economic freedom of franchisees. The agreements (1) prohibited plaintiffs from purchasing and reselling any products other than those purchased from defendants [AA 54];[2] (2) required plaintiffs to retail trademarked and non-trademarked products which they had previously purchased from defendants at prices fixed in price lists supplied by defendants [AA 56]; (3) prohibited sales by the plaintiffs for further resale; and (4) prohibited sales outside areas designated in the franchise [AA 51]. Each agreement was terminable with or without cause on thirty (30) days' written notice by either party [AA 58].

Plaintiffs operated under these agreements until 1959-60. During this period they were compelled to adhere to each and every one of the provisions in the defendants' franchise agreement. To retain their franchise to sell the MIDAS muffler they were required to purchase other non-trademarked exhaust system parts from the defendants [AA 24-25, 26, 27, 28, 30, 31, 34, 35, 39-40, 41-42, 65, 71-72, 78, 79-80, 83, 84, 88], and to sell trademarked and non-trademarked parts at prices fixed by defendants [AA 26, 56, 68, 74, 77, 87-88; R 1303]. Defendants refused to sell to the plaintiffs or to permit them to handle any automo-

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[2] As used herein "AA" means Appellants' Appendix in the United States Court of Appeals for the Seventh Circuit; "R" means the Record of the case as certified to the Court of Appeals by the United States District Court for the Northern District of Illinois, Eastern Division.

tive parts other than exhaust system parts [AA 29, 30, 38, 40, 63-64, 70, 71-72, 76, 79, 89], and refused to allow plaintiffs to sell for resale [AA 26, 73] or to sell outside areas designated in the franchise agreement. Defendants refused to permit plaintiffs to purchase non-trademarked exhaust system parts from defendants' competitors, even though some competitors offered such parts for sale at prices substantially below the prices at which defendants sold these parts to the plaintiffs [AA 27, 28, 30, 31, 32, 34, 35, 39-40, 41-42, 65, 70, 76, 80, 84, 85, 91-94].

Through salesmen who inspected plaintiffs' premises [see, e.g., AA 24-25, 88] and through requirements for periodic financial reports and analyses of dealer orders [AA 24-25, 36], defendants maintained a close surveillance of the operations of these plaintiffs and other franchisees to assure compliance with the terms of their franchise agreements, particularly the exclusive dealing and price-fixing provisions [see, e.g., AA 27-28, 31-32, 88]. Defendants' officers and salesmen continually warned plaintiffs (as well as other franchisees) that any violations of the provisions in the franchise agreement could lead to franchise termination [AA 64-65, 73]. Defendants climaxed a series of threats of franchise termination to one of the plaintiffs (Pierce), if he refused to discontinue purchasing from defendants' competitors, by unilaterally terminating that plaintiff's franchise agreement [AA 22, 25, 33-34, 65]. Subsequently other plaintiffs terminated their franchises to avoid continuing to pay the higher price for non-trademarked exhaust system parts which defendants demanded and received because of their exclusive dealing requirements.[3]

[3]The basic unfairness of the defendants' franchise plan was magnified in 1959 when defendants reneged on their original promise to underwrite the complete cost of their guarantee on their Midas muffler. To induce franchisees to accept their franchise agreement defendants offered a muffler guarantee good at any Midas franchisee in the nation. Defendants promised to reimburse franchisees 100% of their product cost for these replacements, i.e., to bear the full cost

[footnote continued]

This three-count private antitrust action followed in August of 1960, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. 1 [Count I], Section 3 of the Clayton Act, 15 U.S.C. 14 [Count II], and Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13 [Count III].[4] At that time defendants were directing the ~~activ-~~ activities of some 260 dealers operating more than 350 MIDAS Muffler shops in 42 states. The defendants' uniform, preprinted franchises for all of these shops required exclusive dealing as well as resale price maintenance and provided for other unlawful restrictions as a condition of doing business with defendants and purchasing defendants' MIDAS mufflers. Through the use of such agreements, defendants between 1955 and 1960 trebled their business volume to more than $17,000,000 annually. Defendants were the nation's fifth-largest distributors of automotive exhaust parts for the replacement market.[5]

[footnote 3 continued]

of their guarantee program except for labor (with respect to which franchisees were free to make a service charge). In 1959, defendants unilaterally reduced this to a 50% obligation. Franchisees purchased replacements under defendants' guarantee at 50% of cost. This charge equalled (approximately) defendants' cost of production.

Plaintiffs were financially unable to pay higher prices for non-trademarked exhaust system parts and at the same time also defray the real costs of defendants' guarantee program.

[4]The Robinson-Patman claim [Count III, 15 U.S.C. 13] alleged discriminations with reference to discounts and the terms on which defendants offered automotive exhaust parts for sale. Summary judgment for defendants was reversed on this claim which was remanded to the District Court. See footnote 1, supra; infra at 7; footnote 15, infra.

[5]*United States v. A. P. Parts Co.*, CCH Trade Cases 1964, ¶ 71,255. In the 1960 complaint filed by the Department of Justice in that case, defendants here were described as the fifth-largest distributor of exhaust system parts for the replacement market in the United States with approximately 11% of the market. See also *United States v. Maremont Automotive*, CCH Trade Cases 1960, ¶ 69,881.

Just prior to trial, after all discovery had been closed, defendants moved for summary judgment contending that plaintiffs were *in pari delicto* with the defendants. The District Court sustained this defense and granted defendants' motion holding that since plaintiffs had "solemnly subscribed" to defendants' franchise agreement they were ipso facto without standing to sue under Section 4 of the Clayton Act. The United States Court of Appeals for the Seventh Circuit, with one of three judges dissenting, affirmed dismissal of Counts I and II, but reversed dismissal of Count III and remanded that Count for trial.[6]

A petition for rehearing *en banc* was denied with two judges dissenting.

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[6] Plaintiffs' major claims for damage arise under Counts I and II which constituted continuing practices during the entire franchise period of 1955 to 1960. Plaintiffs' damages under Count III, though substantial, relate to Robinson-Patman discriminations which occurred primarily during the period 1959-60. Count III damages are distinctly different from and independent of damages claimed under Counts I and II.

REASONS FOR GRANTING THE WRIT

I

The Court Below Decided a Significant Question of Federal Law in Direct Conflict With *Simpson v. Union Oil Co. of California* and Other Decisions of This Court Which Hold That "in Pari Delicto" Does Not Bar an Action Under Section 4 of the Clayton Act.

Even though the record showed that plaintiffs suffered the impact[7] of practices condemned[8] by Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14), the Court below held that plaintiffs barred themselves from bringing an action under Section 4 of the Clayton Act (15 U.S.C. 15) by "accept[ing]" the defendants' franchise agreement. The majority of a divided court ruled that since plaintiffs had in the first instance

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[7] Plaintiffs were required to pay more for non-trademarked exhaust system parts which they purchased from the defendants than they would have paid had they purchased them from defendants' competitors. Defendants admitted as much in memoranda to their salesmen declaring that some competitors "make a small assortment of popular numbers and distribute them at unjustifiably low prices" [AA 31]; or that ". . . certain tail pipe companies manufacture short lines of easily produced numbers at discount prices" [AA 24].

Price comparisons in the record demonstrate the fact of plaintiffs' damage [AA 91-94]. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 471 (C.A. 9, 1964); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 840 (C.A. 4, 1960). Had plaintiffs purchased tailpipes, by way of example, from defendants' competitors they would have effected savings in the area of 24% off the cost of these items from the defendants. Defendants' prices for these items were approximately 33% more than the prices charged by some of the defendants' competitors. [AA 91-94].

[8] Infra, footnote 10.

"solemnly subscribed"[9] to defendants' franchise agreements, provisions of which required them to (1) deal exclusively with defendants, (2) buy non-trademarked exhaust system parts as a condition of buying the defendants' MIDAS muffler, and (3) sell trademarked and non-trademarked products at prices fixed by defendants,[10] plaintiffs could not complain thereafter and had no standing to sue even though the record showed that these provisions were enforced through coercive threats of franchise termination.[11] This holding runs counter to this Court's interpretation of Sec-

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[9] Appendix B at 6. Plaintiffs' Sherman Act claim was dismissed on the alternative ground that plaintiffs had failed to prove conspiracy.

[10] These restraints are among the type which the Courts have consistently condemned as violative of Section 1 of the Sherman Act: *Standard Oil of California v. United States*, 337 U.S. 293, 69 S.Ct. 1051 (1949); *Anchor Serum v. Federal Trade Commission*, 217 F.2d 867 (C.A. 7, 1954); *Northern Pacific Railroad Company*, 356 U.S. 1, 78 S.Ct. 514 (1958); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1961); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 C.A. 9, 1964); *United States v. Loew's*, 371 U.S. 38, 83 S.Ct. 97 (1962); see also *Guidry v. Continental Oil Co.*, 350 F.2d 342 (C.A. 5, 1965); *Broussard v. Socony Mobil Oil Co., Inc.*, 350 F.2d 346 (C.A. 5, 1965); *United States v. Bausch and Lomb*, 321 U.S. 707, 64 S.Ct. 805 (1944); *Federal Trade Commission v. Beechnut Packing Co.*, 257 U.S. 441, 42 S.Ct. 150 (1922); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503 (1960); as well as Section 3 of the Clayton Act: *Standard Oil of California v. United States*, supra, *Anchor Serum v. Federal Trade Commission*, supra; *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Standard Fashion v. Magrane-Houston Co.*, 258 U.S. 346, 42 S.Ct. 360 (1922); and see *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 808, 86 S.Ct. 1501 (1966).

[11] The Court below said (unanimously) that the District Court's finding that plaintiffs " 'were free to purchase either product [i.e. Defendants' other muffler] but chose Midas [was] erroneous." "The record," it said, "contains much evidence that there was a continuous effort on the part of Midas to enforce the exclusive dealer requirement." [Appendix B at 17].

[footnote continued]

tion 4 of the Clayton Act. *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 84 S.Ct. 1051 (1964), rev'ing 311 F.2d 764 (C.A. 9, 1963); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259 (1951); *Moore v. Mead's Fine Bread Company*, 340 U.S. 944, 71 S.Ct. 528 (1951), vacating 184 F.2d 338 (C.A. 10, 1950); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996 (1948); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959); *Radiant Burner Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365 (1961); *Radovich v. National Football League*, 352 U.S. 445, 77 S.Ct. 390 (1957).

Circuit Judge Walter E. Cummings, who sat on the Court below, agreed with these authorities. In a dissenting opinion he said [Appendix B at 22-23]:

[footnote 11 continued]

In instructions to their salesmen, defendants described franchisee purchases from defendants' competitors variously as a "felony", as "promiscuous," and as a "capital offense" [AA 32]. Defendants "required" those people who were part of the program to be "part of it all the way" [AA 28]. They ordered their salesmen to "see to it that" their exclusive dealing program was "enforced and tell [them] when it wasn't" [AA 31].

Defendants "studied each and every Midas order" as it was processed for shipment to "isolate" those dealers who were not buying tailpipes from them; they distributed the results of this "study" to their salesmen with instructions to enforce the exclusive dealing provisions in the franchise agreement [AA 25, 36-37].

Defendants' salesmen carried out their instructions. One such salesman wrote the plaintiff Ross that it was "Midas policy" that Ross buy "exclusively from Midas." He told Ross he would "go into the matter more fully" on his next visit [AA 40]. The same salesman also complained to Ross that Gordon Sherman (who was president of Midas) had advised him that Ross was "not purchasing clamps from Midas" stating he had to "report" to Sherman on this matter [AA 88].

Plaintiffs Skarupa and Pierce testified to conversations with the defendants' salesmen in which they had been threatened with franchise termination if they purchased from "outside sources" [e.g. AA 78].

"I agree with the majority that *Crest Auto Supplies, Inc. v. Ero Manufacturing Company*, 360 F.2d 896 (7th Cir. 1966) supports the in pari delicto defense to Counts I and II. However, an examination of the briefs filed in *Crest* reveals that *Simpson v. Union Oil Co.*, 377 U.S. 13, was not cited to this Court. A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs Simpson had freedom of choice to 'accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.' He 'deliberately and knowingly enter[ed] into [the] contractual obligations' (311 F.2d 764, 768, 769). In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in *Lyons v. Westinghouse Electric Corporation*, 235 F.Supp. 526, 537 (S.D.N.Y., 1964), stating:

> "'It may be noted that under *Simpson v. Union Oil Co.*, supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong.'

"In *Simpson*, even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was 'untenable' (377 U.S. at p. 25). As in *Simpson*, these defendants had the coercive power to terminate plaintiffs' franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas, who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their price, as did Simpson."

The Court below considered only two of this Court's decisions on Section 4 in its opinion: *Kiefer-Stewart,* supra, and *Simpson,* supra. It relied upon *Kiefer-Stewart,* supra, for the proposition that the *in pari delicto* defense is favored under Section 4, except ". . . where the defense is the unclean hands of a plaintiff in transactions other than one in suit. . . ."[12] This interpretation does not square with the plain language of this Court's opinion in that case. In *Kiefer-Stewart,* supra, the trial court instructed the jury that Kiefer-Stewart's participation in a conspiracy with other wholesalers, as alleged, constituted no defense. In its opinion this Court said:

> ". . . If Petitioner and others were guilty of infractions of the antitrust law, they could be held responsible in appropriate proceedings brought against them by the Government or by injured persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. Cf. *Fashion Originators Guild v. Federal Trade Commission,* 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949; *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 242-243, 68 S.Ct. 996, 1009, 92 L.Ed. 1323." (at 214)

With respect to *Simpson,* supra, the Court below said that this Court did not mention *in pari delicto* in its opinion in that case; that the facts in the instant case were "a far cry" from those in *Simpson*; and finally that *Simpson* involved nothing more than the unlawfulness of Union Oil's coercive consignment agreement.

Simpson cannot be read as the majority of the Court below apparently did, without reference to the opinion which it reversed, 311 F.2d 764 (C.A. 9, 1963). In the Ninth Circuit Court of Appeals, Simpson's antitrust claim was denied for precisely the same reasons which the majority of the

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[12] Appendix B at 11.

Court below used to deny the claims of these plaintiffs.[13] *In pari delicto* was fully argued and briefed by both Simpson and Union Oil in this Court. We submit that in *Simpson,* supra, this Court held not only that Union Oil's consignment agreement was unlawful but also that antitrust plaintiffs are not barred from bringing an action under Section 4 of the Clayton Act simply because they accept agreements binding them to follow price schedules fixed by their suppliers where their suppliers require such agreements as a condition of doing business.

Simpson and the case before the Court are nearly parallel:

SIMPSON v. UNION OIL CO.	CASE BEFORE THE COURT
1. Simpson sued Union Oil under Section 4 of the Clayton Act charging that defendants had violated Section 1 of the Sherman Act.	1. Plaintiffs sued under Section 4 of the Clayton Act charging that defendants had violated Section 1 of the Sherman Act.[14]
2. Simpson complained that Union Oil required him to sell at prices which Union fixed.	2. Plaintiffs complained that defendants required them to sell merchandise which they had purchased from defendants at prices which defendants fixed.[15]
3. Union Oil used its service station leases as a tying device. It tied its leases to its gasoline consign-	3. Defendants used their franchise agreement as well as the Midas muffler as tying devices. These

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[13] Compare the language of the Court's opinion, Appendix B at 12-13, with the language of the Ninth Circuit's opinion in *Simpson,* 311 F.2d at 768-769.

[14] In addition, plaintiffs alleged violations of Sections 2 and 3 of the Clayton Act (15 U.S.C. 13, 14); supra at 7.

[15] Plaintiffs also alleged that they had been required to deal exclusively with defendants, purchase tied products from the defendants and that defendants had discriminated with respect to the terms and discounts on which they sold automotive exhaust system parts to plaintiffs and other of their customers [AA 44-46].

ment agreements in order to promote its price-fixing policies.	devices were used to promote defendants' price-fixing policies and to compel the purchase of tied products such as non-trademarked tail pipes, exhaust pipes, muffler clamps, hangers and Hollywood Mufflers.
4. Simpson accepted Union Oil's consignment agreement and lease with full knowledge that he was required to sell at prices fixed by Union Oil. This was the only basis on which Union Oil would do business with Simpson.	4. Plaintiffs accepted the unlawful restrictions in defendants' franchise as the only basis on which defendants would do business with plaintiffs. One plaintiff, Pierce, accepted defendants' franchise only after he was threatened with enfranchisement of a competitor as a Midas dealer, and with the sale of the International Muffler to his competitors.[16]
5. Union Oil threatened to discontinue business relations with Simpson and refused to renew Simpson's lease because Simpson refused to adhere to defendants' price-fixing policies.	5. Defendants threatened to terminate plaintiff's franchises if they refused to adhere to defendants' price-fixing, exclusive dealing and tying policies. Defendants terminated the franchise of the plaintiff Pierce when he refused to deal exclusively with the defendants and buy their tied products.[17]

[16] At the time defendants offered him a Midas franchise, plaintiff Pierce was already buying defendants' "International" brand muffler. Defendants suggested that they would start selling the "International" muffler to someone else if he refused to accept the franchise agreement [AA 62].

Plaintiff Ross was selling automobile glass at the time he accepted defendants' franchise. Defendants promised that he could continue his profitable business of selling glass [AA 38-39, 70-71, 89]. But see footnote 17 infra.

[17] See, e.g., AA 33, 34, 64-65. In 1958 defendants also changed the rules on plaintiff Ross and threatened to terminate his franchise if he continued selling glass [38-39, 70-71, 89]. Ross, who invested thousands of dollars ($129,000) in advertising defendants' muffler, discontinued the sale of glass to protect his investment in defendants'

[footnote continued]

6. The District Court granted summary judgment in favor of Union Oil holding that Simpson lacked standing to sue because he had agreed to the unlawful restrictions in the first instance.	6. The District Court granted summary judgment in favor of defendants, holding that plaintiffs lacked standing to sue because they had agreed to the unlawful restrictions in the first instance.
7. The Court of Appeals for the Ninth Circuit affirmed, holding that Simpson's "consent" barred recovery from Union Oil.	7. The Court of Appeals for the Seventh Circuit affirmed, holding that plaintiffs' consent barred recovery from defendants.

The thirty-day cancellation provisions[18] in their franchise agreements "laced [plaintiffs] into an arrangement," just as in *Simpson*, supra, under which the supplier-defendants had the power[19] to compel plaintiffs to adhere to provisions in

[footnote 17 continued]
muffler [AA 70]. Still later, after defendants changed the terms of their guarantee and terminated Pierce, Ross terminated his franchise.

[18] Plaintiffs did not even enjoy the security of the one-year leases which Union Oil used. Plaintiffs' franchises could be terminated at any time [AA 58].

[19] Defendants' muffler was nationally advertised and carried a guarantee which defendants' competitors did not offer. Plaintiffs profited from the sale of this muffler. It was this fact which "tied" plaintiffs into the defendants' unlawful program. But for the profitable character of defendants' nationally advertised and trademarked Muffler with its 100% lifetime guarantee, defendants could not have compelled plaintiffs to observe the restraints in the defendants' agreement. Plaintiffs feared the loss of this profitable product in which they had invested thousands of dollars (over $400,000) of advertising. In this connection see *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S. Ct. 97, 102 (1962): Sufficient economic power to impose an unlawful restraint "may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

The Courts below asserted that plaintiffs profited from the very practices about which they complained. This erroneous argument is irrelevant. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326 (1967). Plaintiffs profited from sales of defendants' Midas Muffler in spite of and not from or because of the exclusive dealing provisions in the franchise agreement. It is difficult to imagine how

[footnote continued]

the franchise agreements which required them to (1) buy exclusively from defendants, (2) purchase non-trademarked exhaust system parts as a condition of buying MIDAS mufflers, and (3) sell trademarked and non-trademarked exhaust system parts at prices fixed by defendants. As in *Simpson*, supra, the plaintiffs had the freedom to accept or reject the defendants' franchise agreement; if they rejected defendants' franchise agreement, defendants would not sell them their MIDAS muffler; to buy defendants' MIDAS muffler, plaintiffs had to enter into a franchise agreement. This was the only basis on which defendants would do business.

The Court below said that ". . . coercion [could not] be a factor herein" because plaintiffs "solemnly subscribed"[20] to defendants' franchise agreement which spelled out the restrictions that were the subject of their complaint. It then applied the *in pari delicto* doctrine with the caveat that the defense is available except in cases of plaintiffs ". . . who are coerced *into* illegal agreements. . . ."[21] [Emphasis supplied.]

In effect the Court below permitted defendants to use the franchise agreement which they had drafted, and for which they were solely responsible, to insulate themselves from liability for their subsequent acts requiring plaintiffs to adhere to the exclusive dealing, tying, and price-fixing provisions in those franchises. The Court below ignored the fact that defendants had no right to impose exclusive dealing and price-fixing requirements as part of their franchise agreements, *Goodyear Tire and Rubber Co. v. F.T.C.*, 331 F.2d 394, 401 (C.A. 7, 1964), aff'd 381 U.S. 357, 85 S.Ct. 1498 (1965); the fact that defendants' franchise agreements were illegal even if they were not coercively

[footnote 19 continued]
plaintiffs could have profited from a practice of paying defendants more for parts than they would have otherwise paid if they had purchased such parts from defendants' competitors.

[20] Appendix B at 6, 9.

[21] Appendix B at 11.

induced, *Sun Oil Company v. F.T.C.*, 350 F.2d 624, 636 (C.A. 7, 1965), *cert. denied* 382 U.S. 982, 86 S.Ct. 559 (1966); as well as the fact that plaintiffs accepted defendants' franchise agreements as the only basis on which defendants would do business with them and not in any effort to assist, help, or cooperate with defendants in violating the antitrust laws. The Court below even refused to attach any legal significance to the fact that defendants adopted and used subtle and sophisticated techniques, ranging from covert threats of franchise termination to full-blown termination in cases where actual threats proved ineffective, to compel plaintiffs and other franchisees to observe the unlawful provisions in their franchise agreements.[22] See *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (C.A. 4, 1963); and *Goodyear Tire & Rubber Co. v. F.T.C.*, supra, at 401.

Under the Seventh Circuit's theory, defendants' franchise document constitutes a privately created exemption[23] from the provisions of Section 4 through which franchisors, with complete immunity from franchisee suits under the provisions of Section 4, may require exclusive dealing, fix prices, and effect other unlawful restraints[24] without regard to the public policy legislatively defined in the Sherman and Clayton Acts. The decison of the Court below not only allows

[22] Supra, footnote 11.

[23] Section 4 is not subject to the construction made by the Court below. Section 4 authorizes "any" person injured by reason of anything forbidden in the antitrust laws to sue therefor and recover threefold damages. This Court has construed language similar to the language in Section 4 in other statutes as not permitting any exceptions or any limitations. *Adams v. Maryland*, 347 U.S. 179, 74 S.Ct. 442 (1954); see *Anchor Serum v. Federal Trade Commission*, 217 F.2d 867 (C.A. 7, 1954); and see generally "Standing to Sue Under Section 4 of the Clayton Act," 64 Col. Law Rev. 570 (1964).

[24] i.e. Limit the persons to whom purchasers may sell merchandise, the prices therefor, or the areas in which they may resell. But see *United States v. Arnold Schwinn*, __ U.S. __, 87 S.Ct. 1856 (1967).

defendants to deny their competitors free access to a market for their products but goes far beyond this and permits defendants also to interfere with a purchaser's right to sell to whom he pleases [e.g., AA 26] at prices of his own choosing [e.g., AA 26, 38]. But see *United States v. Arnold Schwinn & Co.*, __ U.S. __, 87 S.Ct. 1856 (1967). Section 4 cannot bear this construction.

The Seventh Circuit's theory in this case virtually destroys Section 4 as a weapon for enforcement of Section 1 of the Sherman Act and Section 3 of the Clayton Act.[25] Sections 1 (in the absence of conspiracy) and 3 require an agreement;[26] consent is a necessary element of such an agreement. Without consent, the agreements which Section 3 of the Clayton Act and Section 1 of the Sherman Act both condemn cannot exist, and plaintiffs cannot state a cause of action. See, *McElheney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959). Having shown an agreement to satisfy the test of those sections, i.e., the franchise contract on which the defendants' whole business concept is predicated, plaintiffs are

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[25]Under the Seventh Circuit's theory franchisees waive their right to the benefits of Section 4 (15 U.S.C. 15) by entering into a franchise agreement even though the agreement is enforced in violation of Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14). But see *Osborn v. Sinclair Refining Co.*, 324 F.2d at 573:

> "If the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by Colgate. See e.g. *United States v. Schrader's Son, Inc.*, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920); *Englander Motors, Inc. v. Ford Motor Company*, 267 F.2d 11 (6th Cir. 1959); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960)."

[26]Section 1 of the Sherman Act (15 U.S.C. 1) condemns contracts as well as conspiracies, *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, 73 S. Ct. 514 (1958); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960).

thrust onto the horns of a false dilemma: the consent essential to the very agreement which they must show to state a cause of action, constitutes a bar to their recovery.

Neither *in pari delicto* nor "consent" has a place in the judicial enforcement procedures established by Section 4. See "*In Pari Delicto* And Consent As Defenses in Private Antitrust Suits," 78 Harv. L. Rev. 1241 (1965); "Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits–An Additional Justification," 54 N.W. Law Rev. 456 (1959).[27] This Court has said that a claim under Section 4 "need only be tested under the Sherman Act's prohibition on unreasonable restraints of trade, . . . and meet the requirement that petitioner has thereby suffered injury." *Radovich v. National Football League*, supra, at 453; *Klor's v. Broadway-Hale Stores, Inc.*, supra; *Radiant Burner, Inc. v. Peoples Gas Co.*, supra; "Standing To Sue for Treble Damages under Section 4 of the Clayton Act," 64 Columbia L. Rev. 570 587 (1964). To the same general effect, see *Mandeville Island Farms v. American Crystal Sugar,*[28] supra:

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[27] ". . . several other district courts have displayed an apparent disregard to the recent Supreme Court and circuit court cases which limited the defense. To the extent that this misunderstanding is accountable for the judicial hesitancy and apparent inconsistency in application, it is earnestly submitted that the courts are doing no injustice to the traditional use of the clean hands requirement by relaxing it in appropriate circumstances. On the contrary, proper application demands a weighing of public policy behind enforcing free competition on the one hand, with the public policy of forbearing aid to a plaintiff guilty of unconscionable conduct on the other. However, where Congress has codified the former public policy into the antitrust laws and has reannounced this policy several times, little evidentiary examination or measurement of comparative degrees of illegality is necessary; the call of public policy here is so loud and clear that it must be given decisive weight." [54 N.W. U. Law Rev. 464, 1959]

[28] In *Mandeville*, supra, the District Court held that Mandeville could not recover because it had failed to satisfy the commerce test and because it had signed a contract forming part of the illegal arrange-

[footnote continued]

"... It is enough that these Petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of legality and immunity ... in view of the statute's policy, ... [is] whether the statute's policy has been violated in a manner to produce the general consequences it forbids ... for particular individuals essential to the recovery of treble damages." (at 243)

The Seventh Circuit's decision does not even accord these plaintiffs standing equal to the standing which this Court granted the plaintiff in *Moore v. Mead's Fine Bread,* supra. There was much more reason to apply the *in pari delicto* defense in *Moore,* supra, than there is to apply it or an alternative defense of "consent" to the case before the Court. Yet in that case this Court did not permit the defense, despite the fact that Mead's violations were an attempt to protect itself against unlawful, predatory practices which Moore had initiated. Moore was the direct and specific cause of his own damage. Moore, nevertheless, sued for treble damages under Section 4. The *in pari delicto* defense was specifically asserted and rejected even though Moore stood truly *in pari delicto.*[29]

The ruling by the Court below defeats the legislative purpose of Section 4 of the Clayton Act. It forecloses potential actions by a vast class of private persons who out of self-interest sue and thereby supplement government actions

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[footnote 28 continued]
ment of which it had complained. The Court of Appeals affirmed on the commerce issue alone. This Court reversed, thereby rejectin the *in pari delicto* defense that defendant had specifically pleaded.

[29]Plaintiffs here are not *in pari delicto.* Plaintiffs have not violated Section 3 which condemns leases, sales and contracts for sale (15 U.S.C. 14). By purchasing or making contracts for purchase plaintiffs did not violate the terms of that section. But the decision of the Court below in dismissing plaintiffs' Clayton Act (Section 3) claim rests squarely on the *in pari delicto* doctrine and nothing else.

Plaintiffs here were merely the victims of an unlawful franchise scheme which defendants adopted and successfully applied.

enforcing the antitrust laws. This Court explained the purpose of Section 4 in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015 (1947), as follows:

> ". . . This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong reliable motive for enforcement which relieves the Government of the cost of enforcement. . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave any injured party a private cause of action in which his damages are to be made good threefold and reasonable attorneys' fees." (at 751 and 752)

Injured persons need not wait for either the Department of Justice or the Federal Trade Commission to compel compliance with the antitrust laws. In Section 4 (and in Section 16, 15 U.S.C. 25) Congress has given them tools to compel compliance[30] and achieve economic redress. Section 4 of the Clayton Act arms and was intended to arm buyers and sellers such as these plaintiffs and these defendants as well as competitors of one another with both the motivation of financial reward and the legal weapon to enforce fundamental concepts of fair competition legislatively spelled out by both the Sherman and Clayton Acts. Indeed, private suits under Section 4 play and were intended to play a vital role in promoting competition. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869 (1955); see, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560 (1964).

The Seventh Circuit's theory in this case produces paradoxical results. It denies benefits of the antitrust laws to one of the very classes of persons that those laws were de-

[30] If the "in pari delicto" defense is available in an action under Section 4, it is, together with the defense of "unclean hands," equally available in an action under Section 16 (15 U.S.C. 25).

signed to protect,[31] negates effective enforcement of the antitrust laws by the very persons who have the closest and perhaps the only personal knowledge of antitrust violations, and at the same time allows defendants to perpetuate practices which the Clayton and Sherman Acts were designed to stop. If Section 4 is to achieve its legislative purpose of amplifying enforcement of the antitrust laws, Federal Courts should not be permitted to override the public policy of Section 4 by expressing a judicial "hostility"[32] to treble-damage claims through the application of common-law principles which antedate the enactment of Section 4.[33] Had Congress intended to include these common law principles as part of its statutory pattern, it would have done so.[34] The Court below, however, should not be permitted to do judicially what Congress refrained from doing legislatively. See "The Unknown Quantity in Private

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[31] *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960).

[32] "Hearings on the Role of Private Antitrust Enforcement in Protecting Small Business Before a Subcommittee of the Senate Select Committee on Small Business," 85th Cong., 2nd Sess. (1958), at 129 (Hansen), at 12 (Loevinger); "The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits," 52 Mich. L. Rev. 363, 364 (1954); "Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of Business," 80 Harv. L. Rev. 1566, 1569 (1967).

[33] The District Court's opinion in this case, which the Court below quoted, demonstrated its "hostility" to plaintiffs' claims when it said it would not allow plaintiffs the "high profit" of a treble-damage suit. [Appendix B at 3]. This avoids the central issue which is whether plaintiffs were in fact damaged. This statement also demonstrates the Court's fundamental misunderstanding of the purpose of Section 4 (15 U.S.C. 15).

[34] Some State antitrust statutes have incorporated in their language the common law concepts which the Court below used to deny plaintiffs relief. See e.g., Kan. Gen. Stat. Anno. ¶ 50-116 (1949).

Antitrust Suits–The Defense of In Pari Delicto," 42 Va. L. Rev. 785, at 787 (1955).

The drastic implications of the Seventh Circuit's holding in which defendants' franchise agreement was validated with the imprimatur of that Circuit can be partially measured by reference to its prospective application to franchising which is "one of the most rapidly growing methods of distribution today" in the United States.[35] Franchising is currently a 70-billion-dollars-a-year industry of 450,000 franchisees.[36] One out of every four dollars of the nation's retail sales is made through franchise outlets.[37] According to proponents of franchising, "many franchise systems are and must by their very nature be based on a relationship of exclusive dealing."[38] "Almost all [franchise agreements] specify that no competing lines may be carried and no business of a competing nature may be conducted."[39] According to Rufus E. Wilson, Chief of the General Trade Restraints Division of the Federal Trade Commission, ". . . the very nature

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[35] The Franchise System of Distribution, Edwin H. Lewis and Robert S. Hancock (1963), at 1.

[36] The New York Times, July 9, 1967, section 3 at pp. 1, 12. The current importance of franchising and its antitrust implications is demonstrated by the fact that both the Federal Bar Association and the American Bar Association devoted antitrust programs to the subject of franchising at their recent annual meeting. 316 ATRA, A-1 (August 1, 1967); 317 ATRA, A-1 (August 8, 1967). See also S. 2321 sponsored by Sen. Hart, designed to protect franchisees against cancellation by the franchising company.

[37] The New York Times, *ibid* at p. 1.

[38] "Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate on S. 2549," 89th Cong., 2nd Sess., at 1076 (Statement of Lewis Rudnick, Counsel for the International Franchise Association).

[39] The Franchise System, *Ibid* at 41.

of a franchise agreement suggests a restraint of trade. . . ."[40]

Without the deterrent force of the treble-damage provisions of Section 4 the number of antitrust violations undoubtedly will increase. If the Seventh Circuit's theory stands, franchisors can make a mockery of the provisions of Section 4 (as well as other sections of the Sherman and Clayton Acts) by the absurdly simple technique of reducing unlawful antitrust restrictions to the very agreements which the antitrust laws specifically condemn.[41] Moreover, the theory of the Court below will also preclude every franchisee who has already signed an agreement with his franchisor [which unlawfully restricts his right (1) to sell merchandise which he has purchased (a) to whom he pleases, and (b) at prices of his own choice, or (2) to buy from whom he wants] from complaining under Section 4.[42] Franchisors have little to fear from their antitrust schemes if their only exposure to franchisees is the threat of the prospective provisions of an injunction under Section 16 (15 U.S.C. 25).

Private enforcement is essential to the effective administration of the antitrust laws. The Department of Justice

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[40] "Briefing Conference on Antitrust Laws and Trade Regulations Sponsored by Federal Bar Association," January 4, 1962. See, e.g., *Robinson and Sons, Inc. v. Mr. Donut of America, Inc.*, 313 ATRA at A-10 (July 11, 1967), in which a recent treble-damage plaintiff sued under Section 4 alleging that it had been required to deal exclusively with its franchisor. See also *Siegel v. Chicken Delight, Inc.*, 319 ATRA at A-12 (August 22, 1967).

[41] Franchisors could offer their unlawful franchise agreements until accepted. Potential franchisees who refused to accept would not have a cause of action because they would have no contract within the meaning of Section 3; e.g. *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959). On the other hand, if franchisees accept the franchisors' agreement they will be barred, ipso facto, under the Seventh Circuit's "consent" theory.

[42] E.g., *Robinson & Sons, Inc. v. Mr. Donut of America, Inc.*, 313 ATRA at A-10 (July 11, 1962), footnote 40. See also, *Siegel v. Chicken Delight*, 319 ATRA at A-12 (August 22, 1967).

and the Federal Trade Commission do not have either the financial or administrative ability to sift out all violations and act upon them by themselves. Moreover, the penalties which these agencies are permitted to seek may be far less effective than the provisions of Section 4 of the Clayton Act since the damages which grow out of Sherman and Clayton Act violations can exceed by far the criminal and civil penalties which a court is likely to impose in an action brought by the Government. The threat of a damage action is a potent deterrent to violations of the antitrust laws. It is in fact the most effective deterrent against such violations. See "Unclean Hands, The Effect of Antitrust Violations on Antitrust Actions," 113 Pa. L. Rev. 1071, 1080 (1965).

II

Except in the Seventh Circuit the Right of Dealer To Sue His Supplier for Antitrust Violations Under Section 4 Has Been Consistently Sustained.

If the instant suit had been brought in any other Circuit except the Seventh, plaintiffs' right to maintain their action would have been sustained. Neither *in pari delicto* nor "consent" would have barred their standing to sue. *Osborn v. Sinclair Refining Co.*, supra; *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Broussard v. Socony Mobil Oil Auto Co.*, 350 F.2d 346 (C.A. 5, 1965); *Guidry v. Continental Oil Company*, 350 F.2d 342 (C.A. 5, 1965); *Red Rock Bottlers v. Red Rock Cola Co.*, CCH Trade Cases 1953 ¶ 67,375 (D. Ga., 1952).[43]

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[43] ". . . the plaintiff was not in business, could not be coerced, and was organized and created for the purpose of engaging in business by reason of the rights granted under the contracts which contained the provisions now challenged, and did so operate for several years.

* * *

"Here the provisions of the contract which are challenged are for the benefit of the defendants. Plaintiff derived no benefit from act-

[footnote continued]

In *Osborn v. Sinclair Refining Co.*, supra, the Fourth Circuit held that attempts to control dealer judgments as to purchases of automotive products by pressure, threatened loss of dealer's lease, and finally lease termination, were unlawful and gave rise to a treble-damage action by the dealer. In language strikingly similar to the language of this Court in *Bruce's Juices,* supra, the Fourth Circuit said:

> "The treble-damage action under Section 4 of the Clayton Act 'supplements government enforcement of the antitrust laws,' *United States v. Borden Co.*, 347 U.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954). Or as another court has put it, 'The grant of a claim for treble damages to persons injured was for the purpose of multiplying the agencies which make them more effective.' *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 214 F.2d 891, 893 (5th Cir. 1954), cert. denied 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955). The limitation upon the recoverable damages in a private antitrust suit, such as was imposed by the court below, would in large measure frustrate this salutary purpose." (at 572)

Lessig v. Tidewater Oil Co., 327 F.2d 459 (C.A. 9, 1964), and *Bales v. Kansas City Star,* supra, are to the same effect. In both cases distributors attempted to restrict the activities of their dealers. Lessig, a Tidewater dealer, was required to maintain prices fixed by Tidewater. Bales, a Kansas City Star dealer, was required to agree that he would not sell or circulate any other newspaper except the Star. In both cases the courts sustained the dealer's right to sue under Section 4.

Although the Seventh Circuit was aware of these decisions, it refused to follow them. In its opinion it cited only two of these decisions: *Osborn,* supra, and *Bales,* supra. It sought to distinguish *Osborn,* supra, on the ground that in

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[footnote 43 continued]
ing under them; the provisions being restricted in character, they were of sole benefit to the corporate defendants.

"Under the facts of this case the plaintiff does not stand *in pari delicto* with the corporate defendants. . . ." (at page 67, 965)

that case there was no formal agreement. This distinction is without merit. The Court found an agreement in fact in that case[44] and authorized the recovery of damages growing out of an exclusive dealing agreement *to which Osborn had freely consented.*

With regard to *Bales,* the court below said that that case was different from the case before it because Bales had entered into the agreement only out of business necessity. Of course, as Circuit Judge Cummings pointed out (and as the record in this case shows), this is also true of the present plaintiffs.[45] Defendants would not do business with the plaintiffs unless they executed a franchise agreement which contained provisions requiring plaintiffs to deal exclusively with, accept tied products from, and sell at prices fixed by, the defendants.

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[44] 286 F.2d at 836-837.

[45] Appendix B at 22. Defendants' muffler franchise system was the only such system available in 1955-1956. If plaintiffs wanted a muffler franchise with national advertising and a replacement guarantee, they had no choice but to do business with defendants. See, e.g., *Goldlawr v. Shubert,* CCH Trade Cases 1967, ¶ 72,147 (E.D.Pa., 1967).

III

The Sherman Act Condemns Contracts in Restraint of Trade. Conspiracy Is Not Essential to a Claim Under Section 1 of the Sherman Act.

The court below dismissed plaintiffs' Sherman Act claim holding that plaintiffs had failed to prove conspiracy.[46] Conspiracy is not an essential element of a claim under Section 1 of the Sherman Act. The language of that Section is disjunctive, prohibiting contracts *or* combinations in the form of trusts as well as conspiracies. The record in the

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[46] The plaintiffs disagree with the finding of the court below that no conspiracy existed [Appendix B at 13]. See *Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons, Inc.*, 317 ATRA X-1 (D. Hawaii, 7/27/67); *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 914 (C.A. 5, 1952). The record raised an issue of fact as to conspiracy. Circuit Judge Cummings in his dissenting opinion noted this [Appendix B at 24]:

> "With respect to the majority's alternative basis discussed at p. 13 supra, this record shows that Midas and International held themselves out as separate and 'divorced'. Therefore, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* [1950-1951 Trade Cases ¶ 69,952), 340 U.S. 211, does not permit defendants to claim that as a single business entity they were unable to conspire. Furthermore, under *Simpson v. Union Oil Co.* [1964 Trade Cases ¶ 71,085], 377 U.S. 13, and *Northern Pacific Railway Co. v. United States* [1958 Trade Cases ¶ 68,961], 356 U.S. 1, a conspiracy is not needed to support Count 1."

The record showed the defendants' corporations together constituted a complex multi-corporate structure in which one or more separately incorporated subsidiaries held themselves out as competitors of one another. Defendant International, for example, sold its International brand muffler which was identical to the Midas muffler (except for brand) to retailers who were in competition with plaintiffs, who purchased the Midas brand muffler from the defendant Midas [AA at 68]. Under such circumstances plaintiffs have for the purpose of summary judgment established a conspiracy within the meaning of Section 1 of the Sherman Act. See e.g. *Hawaiian Oke and Liquors Ltd.*, supra, in which the court held that even unincorporated sales divisions of a single corporation can conspire.

case at bar shows an agreement in restraint of trade within the meaning of Section 1 [AA 50-59]. Indeed, the record shows hundreds of such agreements spread all over the nation. These agreements are well within the prohibitions of Section 1 of the Sherman Act. *Northern Pacific Railroad v. United States,* supra; *Bales v. Kansas City Star,* supra; *Simpson v. Union Oil Co.,* supra.[47] It was plain error for the Court below to ignore these agreements and dismiss plaintiffs' Sherman Act count by simply asserting that plaintiffs had shown no conspiracy when proof of a conspiracy was not essential to plaintiffs' claim.[48]

IV

Plaintiffs' Right to a Decision on the Merits Was Denied by Summary Judgment Even Though the Record Disclosed Disputed Issues of Fact.

The summary judgment of the District Court conflicts with decisions of this Court which grant private antitrust plaintiffs the right to a decision on the merits. *Radovich v. National Football League,* supra; *Klor's v. Broadway-Hale,* supra; *Poller v. Columbia Broadcasting Co.,* 368 U.S. 464, 82 S.Ct. 486, (1962); *Continental Ore Company v. Union Carbide Corporation,* 370 U.S. 690, 82 S.Ct. 1404 (1962); *Simpson v. Union Oil of California,* supra. It was erroneous for the Court below to affirm the summary judgment entered by the District Court.

The record shows that plaintiffs and defendants were and are ready for trial. Discovery[49] by both defendants and plain-

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[47] Compare *Albrecht v. Herald Co.,* No. 975, in which this Court recently granted certiorari (February 27, 1967), involving a single contract of a news dealer who was terminated because he refused to follow the price policy established by the newspaper which he distributed.

[48] Plaintiffs' Sherman Act Count alleged a *contract or conspiracy* [AA 44-45].

[49] Both defendants and plaintiffs had completed an exhaustive discovery procedure in which thousands of pages of testimony by deposition

[footnote continued]

tiffs has been completed. Moreover, the decision of the Court below will not eliminate the necessity for trial of of this complex matter since the antitrust ramifications of plaintiffs' claim for damages arising from defendants' violations of the Robinson-Patman Act were remanded for trial.

The Court below segmented plaintiffs' antitrust claims as well as the record and refused to look at the full fabric of defendants' unlawful system of distribution and plaintiffs' claims based thereon. Having found as a "fact" that plaintiffs "consented" to defendants' franchise agreement, for example, the Court ignored the legal significance of plaintiffs' evidence of coercion, even though it held that subsequent coercion existed.[50] The fact that plaintiffs signed franchise agreements constitutes only one piece of evidence. The fact that defendants coerced plaintiffs into compliance with unlawful provisions in their franchise agreements is another. Indeed, it was not the plaintiffs' entering into defendants' franchise agreement but, rather, the defendants' ~~ants'~~ subsequent enforcement of the terms of that franchise agreement which constitutes the gist of the offense of which the plaintiffs complain. The existence of legal coercion is something that should have been decided on the basis of all evidence, not simply the signing of the agreement. If all facts were taken into consideration on the coercion issue, it is entirely possible and even probable that a jury would reach the conclusion that *in pari delicto* did not apply. See *Goldlawr Inc. v. Shubert*, supra. The existence of this genuine issue of fact precluded summary judgment.

[footnote 49 continued]

had been taken, hundreds of pages of answers to interrogatories had been filed, and thousands of documents had been marked for identification.

[50] Appendix B at 17; Footnote 11 supra.

The record disclosed other genuine issues of major and material fact with respect to the existence of conspiracy[51] as well as with respect to whether plaintiff Pierce's franchise was terminated on an "agreeable basis."[52] In view of these genuine issues of fact the case was not ripe for summary judgment. The Court below should have reversed the District Court's decision.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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[51] Footnote 46, supra.

[52] Supra at 14, footnote 11, supra; see also AA 22, 25, 33, 34, 64-65.